Filed 7/30/02 P. v. Nurse CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DELL GALEN NURSE, Defendant and Appellant.	A095387 (Solano County Super. Ct. No. FCR188007)

A jury convicted defendant Dell Galen Nurse of evading a police officer and unlawful taking of a vehicle. Defendant appeals, contending the trial erred in denying his motion for a mistrial under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). We find no error. Accordingly, we affirm.

I. BACKGROUND

Defendant was charged with evading a police officer with willful and wanton disregard for the safety of persons and property (Veh. Code, § 2800.2, subd. (a)) and unlawful driving or taking of a vehicle (*id.*, § 10851, subd. (a)).

At the trial, the court first questioned the jury, then allowed each side 10 minutes to conduct additional voir dire. After one juror had been dismissed for cause, the parties exercised peremptory challenges. The prosecutor challenged a total of three jurors, all of whom were African-American women.

After the prosecutor had challenged the third African-American woman, the defense brought a motion for a mistrial under *Wheeler, supra,* 22 Cal.3d 258. The trial

court found a prima facie showing of group bias and asked the prosecutor to provide an explanation for his challenges.

In rebuttal, the prosecutor explained the reasons for striking the three prospective jurors. The first, Ms. G., had stated in her jury questionnaire that she had moral or religious principles that would affect her ability to judge, although she had stated during voir dire that she did not think her principles would make it difficult to judge defendant's case in particular. The prosecutor had also noticed that Ms. G. spent a great deal of time looking up at the light fixtures during voir dire. The prosecutor stated that, based on those two factors, he believed she was the weakest juror and he excused her in order to make room on the panel for other, stronger jurors.

The prosecutor explained that he had challenged the second prospective juror, Ms. F., because she had previously sat on a jury that had acquitted a criminal defendant. Even after she later heard information suggesting that the defendant in the earlier trial may have been guilty, she still supported her decision to acquit the defendant.

The prosecutor challenged the third juror, Ms. C., as soon as she took a place that had been vacated by a previously stricken juror. He did not question her before challenging her. The prosecutor told the court he challenged Ms. C. because she had filled out the jury questionnaire incorrectly, repeating the same phrase several times in answer to questions that seemed to call for different answers.[1] According to the prosecutor, the jury questionnaire was relatively simple, and he was concerned that a juror who had not filled it out correctly might be unable to be a fair and impartial juror.

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[1] According to the prosecutor, Ms. C. indicated that she was single. She listed her present occupation as "full-time mom." In response to questions about her spouse or significant other's occupation, about her own previous occupation, and about her spouse or significant other's previous occupation, she repeated "at-home mom" or "full-time homemaker." The prosecutor stated that he did not understand her answers, and that it appeared she simply kept filling in the blanks with her own present status as a full-time mother.

The prosecutor then told the trial court he did not realize until after the third challenge that the three jurors he had challenged were all of the same race, and that his decision to challenge the jurors was not based on their race.

The trial court denied the *Wheeler* motion, stating, "I accept the representations of counsel. I don't find they were based on an improper basis."

After trial, defendant was convicted and sentenced to a total of three years eight months in prison.

II. DISCUSSION

A. Standards Under *Wheeler*

A criminal defendant has a constitutional right to a jury drawn from a representative cross-section of the community. (*Wheeler*, *supra*, 22 Cal.3d at p. 272.) The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates this right. (*Id.* at pp. 276-277.) This right has been recognized by both the California Supreme Court in *Wheeler* and by the United States Supreme Court in *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89 and *Powers v. Ohio* (1991) 499 U.S. 400, 404.

However, a party may exercise a peremptory challenge on the basis of a specific bias relating to the particular case on trial. (*Wheeler, supra*, 22 Cal.3d at p. 276.) For instance, the prosecutor may properly strike a juror because he has a record of prior arrests, has complained of police harassment, or because his clothes or hair length suggest an unconventional lifestyle. A party may mistrust a juror's objectivity based on the " 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.' " (*Id.* at p. 275, quoting 4 Blackstone, Commentaries 353.) Because these impressions are not founded on race-based characteristics, they may properly be the basis for peremptory challenges. (*Wheeler,* at p. 276.)

If the trial court finds that a prima facie case of group bias has been made, "the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone." (*Wheeler, supra,* 22 Cal.3d at p. 281, fn. omitted; see also *People v. Alvarez* (1996) 14 Cal.4th 155, 193; *People v. Johnson*

(1989) 47 Cal.3d 1194, 1216.) To do so, the challenging party must "satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses . . . ." (*Wheeler, supra,* 22 Cal.3d at p. 282.) The party need demonstrate only a " 'genuine, reasonably specific, race- or group-neutral explanation related to the particular case being tried.' " (*People v. Ervin* (2000) 22 Cal.4th 48, 74-75.) The trial court then must evaluate the credibility of the explanation. (*People v. Silva* (2001) 25 Cal.4th 345, 384-385.) As our Supreme Court has stated, "we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*Wheeler, supra*, 22 Cal.3d at p. 282.)

" ' "Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with 'considerable deference' on appeal. [Citations.] If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm." ' " (*People v. Crittenden* (1994) 9 Cal.4th 83, 117.) We accord this deference, however, "only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. [Citations.] When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386.)

B. There Was No *Wheeler* Error

Defendant contends the trial court did not make the required sincere, reasoned attempt to evaluate the prosecutor's explanations for exercising the peremptory challenges against the African-American jurors. We disagree. The record shows the prosecutor's stated reasons for exercising his challenges were "both inherently plausible and supported by the record." (*People v. Silva, supra,* 25 Cal.4th at p. 386.) In these circumstances, the trial court was not required to question the prosecutor or make detailed findings. (*Ibid.*)

The prosecutor stated he challenged Ms. G. for two reasons: She had indicated her moral or religious principles might make it difficult to judge fairly, and she had appeared inattentive during voir dire, spending a great deal of time looking up at the light fixtures. He also said that he believed there were more favorable prospective jurors about to be called to the jury box. These are valid, race-neutral reasons for challenging a juror. (See *People v. Johnson, supra,* 47 Cal.3d at pp. 1218-1219 [prosecutor could reasonably exclude jurors who disliked the death penalty, even if further questioning revealed they would vote for the death penalty if it were appropriate; these answers did not preclude concern that the jurors were predisposed against the death penalty]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1047, 1048 [juror's apparent lack of interest in proceedings suggested she could not be impartial juror]; *People v. Alvarez, supra,* 14 Cal.4th at pp. 194-195, 197 [prosecutor made showing of absence of purposeful discrimination where, among other things, he believed more favorable jurors would be called into the jury box].)[2]

Defendant suggests that the prosecutor may have confused Ms. G. with another juror when he stated that he was concerned about her religious or moral beliefs interfering with her ability to judge fairly. Whether or not other jurors also expressed such concerns, the record shows Ms. G. in fact did so. Furthermore, as explained above, the prosecutor stated other race-neutral reasons for challenging Ms. G. (See *People v. Alvarez, supra,* 14 Cal.4th at p. 198 [even if prosecutor were mistaken about one of the stated reasons for challenging juror, that fact did not undermine the sufficiency of the prosecutor's other neutral explanations].)[3]

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[2] The prosecutor stated that he thought four or five prospective jurors among jurors Nos. 13 through 18 would be stronger jurors. Defendant states that the prosecutor challenged two of the six jurors between Nos. 13 and 18, and suggests that the prosecutor's expressed preference for later jurors was a sham. Even based on defendant's own calculations, the prosecutor did not challenge four of the six jurors between Nos. 13 and 18. The record does not contradict the prosecutor's explanation.

[3] Defendant also points out that the prosecutor did not challenge other jurors who had indicated they might have difficulty judging because of religious or moral beliefs.

The record also indicates the prosecutor had valid, race-neutral reasons for challenging the other two jurors. Ms. F. had previously sat on a jury that acquitted a defendant, and she continued to support her decision to acquit despite having later received information suggesting the defendant in that case might have been guilty. The prosecutor could reasonably have believed Ms. F. would not be a favorable juror. (See *People v. Ayala* (2000) 24 Cal.4th 243, 266 [prosecution could reject juror who had been a holdout for acquittal in previous jury and was rejected from a law enforcement position].) Ms. C. answered straightforward questions on the jury questionnaire incorrectly, giving the same answer to several questions that appeared to call for different answers, supporting the view that the prosecutor believed, for race-neutral reasons, she would be an undesirable juror. (See *People v. Alvarez, supra*, 14 Cal.4th at pp. 194-195, 197 [prosecutor could properly reject juror for confusion on voir dire].)

The record supports the trial court's conclusion that the prosecutor's actions were not based on improper bias. The explanations the prosecutor gave were both plausible and supported by the record.[4] As the court stated in *People v. Cummings* (1993) 4 Cal.4th 1233, 1282: "The prosecutor offered adequate justification, unrelated to group bias, for the exercise of peremptory challenges. [Citations.] It was not necessary for the court to make additional inquiry. There is no basis in the record for the assertion that the

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However, as our Supreme Court has stated, "the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar." (*People v. Johnson, supra*, 47 Cal.3d at p. 1221; see also *People v. Turner* (1994) 8 Cal.4th 137, 169 ["we have previously rejected a procedure that places an 'undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor,' noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial," quoting *People v. Johnson, supra*, 47 Cal.3d at p. 1220].) In any case, as noted above, the prosecutor had more than one race-neutral reason for challenging Ms. G.

[4] The only explanation the prosecutor gave that is not reflected in the record is that Ms. G. spent a great deal of time looking at the light fixtures. The court presumably had the opportunity to observe Ms. G.'s demeanor.

court failed to scrutinize the prosecutor's reasons to determine if they were pretextual." There was no *Wheeler* error.

III. DISPOSITION

The judgment of the trial court is affirmed.

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RIVERA, J.

We concur:

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KAY, P.J.

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REARDON, J.